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Contaminated land:

Corporate asset or balance-sheet time bomb?

Over the last few years, focus on contaminated land issues has been driven by growing public awareness of the environment, better understanding of the harm caused by hazardous pollutants, the constant appetite for residential property and the emergence of greater understanding of corporate responsibility in relation to contaminated land.

As more is understood about the impact of the contamination caused by historic manufacturing practices on human health and the environment, governments are increasingly imposing tight regulations to make polluters take responsibility for legacy assets. This is forcing owners to do more to ensure contaminated sites are cleaned up or neutralised.

In this article, we are going to look at the issue of contaminated land, the responsibilities for cleaning it up and the dangers legacy assets pose for financiers and investors.

Legacy assets

Contaminated land is not restricted to properties rendered wastelands through heavy industrial or mining purposes. Any site where chemicals and wastes have been handled, stored or disposed of could be a liability – from obvious ones like those used for chemical manufacturing, automotive repairs, abattoirs, film processing or dry cleaning to more innocuous sites like those used for market gardens, farms or even a simple caravan park with petrol bowsers and an underground storage tank.

Changing community attitudes towards land contamination and corporate responsibilities have resulted in thousands of legacy assets in this country being transformed into potential balance-sheet time bombs for corporate Australia. All of the big, long-term ASX performers should be looking for environmental skeletons in their closet. They could find significant liabilities that are insulated from nearby residential populations by no more than a chain-link fence and a padlock.

Beyond the responsibility to the community to prevent harm to people and the environment, big business

is finding that its traditional care-and-maintenance approach to contaminated land is no longer enough to satisfy the board, shareholders or the regulators. As environmental regulations become more punitive, companies are recognising that the longer they put off addressing legacy assets on their books, the more fulsome and expensive the inevitable remediation will be.

Around the country, courts have been increasingly prepared to order significant penalties over environmental issues as regulation around the issue becomes tighter and regulatory bodies obtain greater powers. Over the past decade in Victoria, for example, the maximum penalty for a Tier 2 pollution offence has increased from \$20,000 to \$272,000. In NSW, amendments to the Contaminated Land Management Act make it easier for the EPA to issue an order and provide it with greater flexibility in determining who it serves the order on. Maximum fines for pollution – particularly reckless or negligent offences – are now significant: Victoria - \$1.134m; NSW - \$5m; SA - \$2m; Qld - \$2.082m.

Contamination of your property asset can have a significant impact on its value. And if there are off-site impacts, there is a real risk that the regulators will



demand costly abatement works. Together, these can turn an asset into a significant liability problem. It is important to remember that disposing of the land does not necessarily end your responsibility for the site or liability for the clean-up.

The buck stops with someone – is it you?

In Australia, laws governing the management and liability of contaminated sites vary from state to state, although the general principle across most jurisdictions is that the polluter pays. While that may sound reasonable, the greater issue is that where it is impractical or impossible to attribute liability to the actual polluter, responsibility can fall back to the current owners or occupiers of the site.

As a financier or potential purchaser, you need to have a very clear understanding about whether that responsibility could land in your lap. You also need to be cognisant of the fact that the cost of cleaning up a contaminated site could run into tens of millions of dollars and carries the risk of community outrage and significant reputational damage to your brand.

In Victoria, the Environmental Protection Act (1970) enables the EPA to issue a clean-up notice on the polluter or occupier of contaminated land. Remember that the term “occupier” is defined broadly and includes controlling financial institutions (including receivers and managers) and mortgagees in possession.

This means that mortgagees in possession may find themselves unwittingly responsible to undertake and fund clean-up measures, particularly if the original polluter is insolvent. In some circumstances, this liability can extend to liability for contamination that was caused many years ago by previous owners of the site – not just that caused during the period of the controller’s occupation.

Financiers need to be very aware of the potential for exposure to this liability when considering their options in relation to security enforcement or to the adverse impact contamination can have on the value of property assets. It is important to undertake due diligence not only regarding the potential for liability but also over the potential cost of any necessary clean up.

What to look for

Obviously, the first clue that a site may be contaminated could come through its current use, but given the potential costs involved it is worthwhile assessing the

A silk purse from a sow’s ear

In 2001, Ferrier Hodgson was appointed administrators of Pasminco, the world’s biggest zinc producer. As part of its role, Ferrier Hodgson was placed in charge of Pasminco’s Cockle Creek Smelter, near Newcastle in NSW, which since 1897 had run a lead and zinc smelter on the 200-hectare site. Over more than a century, a strong local community built up around the Cockle Creek site while the smelter continued producing the pollution that was a legacy of historical industrial processes.

Ferrier Hodgson closed the smelter in 2003. The New South Wales Department of Environment, Climate Change and Water issued a Remediation Order over the site which required the Significant Risk of Harm (SRoH) to human health and the environment to be addressed. The Remediation Order demanded the containment of pollution within the site boundaries.

In this instance, instead of putting the site onto perpetual care and maintenance or disclaiming the land, Ferrier Hodgson engaged in extensive negotiation with NSW Government agencies to develop a business case that not only addressed the SRoH but remediated the land. This allowed the rezoning of the land for a variety of uses – ranging from light industrial to residential – which has transformed the site into a valuable asset.

During the \$60 million remediation, the smelter plant and other structures were dismantled and 2 million tonnes of contaminated material is being buried in a specially designed, sealed containment cell. With new roads and infrastructure currently underway, this now-valuable land is set to become a useful part of the surrounding community once more.

Through this unique approach, a legacy asset once assessed to be an industrial eyesore and potential \$200 million liability, is being transformed into a valuable residential and business hub for the region boosting returns to Pasminco creditors by tens of millions of dollars.

site's historical use as well – to determine the likelihood of prior contamination. The level of testing required will depend on the type and quantity of contaminants on the site, including those that may exist underground.

Environmental testing may be required above and below ground and along the boundaries of a site. What may look like a relatively clean site on the surface may mask severely contaminated soil or groundwater affected by heavy metals, PCBs or other dangerous chemicals. Look, too, for evidence these contaminants may have leached beyond the boundaries of the land.

Environmental investigation costs are often high, and in our experience, an iterative approach is preferable and more cost effective. Avoid a scattergun approach and make sure that testing is dictated by the types of contamination risk present.

Varying levels of remediation are imposed by different government authorities. This will depend on the zoning of the land and your proposed uses for it: obviously, the cost to clean up a site zoned residential will be more onerous than sites zoned for industrial use. Would-be owners and financiers need to determine the optimal overall net return, taking into account both the costs of remediation and potential returns from land sales.

The mere suggestion of contamination can be responsible for a significant discount to the value of land assets, but by being accurately informed you can remove uncertainty from a sale process.

The importance of having this certainty was clearly illustrated when Ferrier Hodgson was appointed receivers and managers of a freehold caravan park this year. The property had petrol bowsers and an underground storage tank which was reflected in the low-ball range of the property's valuation. However, a targeted environmental review immediately identified there was minimal risk of contamination, and the property was sold quickly, well above the earlier valuation.

Financiers also need to be aware of the liability danger caused by current tenants. Imagine a scenario where a heavily polluting tenant becomes insolvent and the responsibility for the site falls back to the financiers holding security over the asset. Steps need to be taken to ensure the tenant accepts responsibility to clean up the site and possesses the financial capacity to undertake remediation.

In the case of mortgagees in possession, they need to have a strategy to deal with tenants if they take possession

Dirty Business

- In Victoria on 17 December 2008, Mobil Refining Australia (Pty) Ltd was prosecuted for a petrol leak from a hole in a steel pipeline. Mobil pleaded guilty and was convicted of causing an environmental hazard and ordered to pay a penalty of \$510,000. At the time of the hearing, Mobil had already spent more than \$660,000 on the pipeline repair. The total clean-up operation is expected to take until 2012 and cost Mobil around \$13 million.
- In NSW on 14 August 2008, CSR Building Products Limited was prosecuted for a spill of 3,250 litres of hazardous chemical GEP2. CSR was ordered to pay a significant penalty totalling more than \$430,000.
- In Queensland on 26 August 2008, Parkside Holdings Pty Ltd and its employee Ronald John Bergman were found to have breached s430(3) of the Environmental Protection and Other Legislation Amendment Bill 2007. The breaches were in relation to the burying of more than 70 44-gallon drums of banned, timber-treatment chemical waste at the company's Builyan timber mill. Parkside was fined \$100,000 and Bergman \$20,000 for illegally burying the chemicals. The EPA said Parkside's costs for cleaning and rehabilitation at the timber mill could exceed \$1,000,000.
- In SA on 4 March 2009, Mulhern's Waste Oil Removal Pty Ltd was convicted of 10 offences and received a fine of \$460,000. Including the clean-up cost, the incident cost MWOR almost \$700,000.
- On 7 July 2010, the Spotless Group settled a legal dispute over a contaminated site in Melbourne for \$4 million. The contamination meant a block of 49 apartments built in 2003 were never occupied and fell into disrepair. Spotless agreed to the settlement with the owner of the property, and said in a statement to the ASX that the settlement is the "best possible outcome for Spotless" given the plaintiff had sought about \$10 million plus legal costs.

*The majority of these prosecutions were identified by legal firm Blake Dawson in an article by partner Robert Jamieson and lawyer Indra Soysa entitled "Trends in environmental prosecutions nationally". It appeared in *Environment Matters*, 2 October 2009, available at www.blakedawson.com*

of a leased contaminated site where the current tenant is not the polluter. In this instance, steps may have to be taken to ensure contaminants pose no risk to the tenants and their employees. In a worst-case scenario, tenants may need relocation to an alternate site if contaminants are a danger to occupants or if remediation works will inhibit the tenant's activities.

Conclusion

When it comes to pollution liability, the most important step is to do your homework, to understand your responsibilities and to take proactive steps to address it before it becomes a financial or reputational issue. Consider all your property exposures and ask yourself whether you really know the history of every asset: can you say categorically that every one of them is free of contamination of any kind?

It comes down to asking some hard questions:

- How closely have you examined contamination issues in relation to your property exposures?
- If an asset you are associated with has a contamination issue, how much do you know about the contamination and do you fully understand the extent of your liability?
- Do you have a clear picture of what remediation could cost?
- What are your options and how do you plan to respond?

By understanding your options, you can set a strategy to limit the liabilities and costs and maximise the value of the asset. The best way to get a full understanding of your options is to seek advice from professionals with the right combination of skills and experience in asset remediation and property planning and development.



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